Court of Appeals, State of Michigan

ORDER

People of MI v Roy Alexander Charles

Docket No. 246034

LC No. 2001-177229-FH

Jessica R. Cooper
Presiding Judge

Helene N. White

Stephen L. Borrello
Judges

Having GRANTED reconsideration in this matter by order entered July 2, 2004, it is further ordered that this Court's opinion issued May 18, 2004 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 0 2 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2006
v	No. 246034 Oakland Circuit Court
ROY ALEXANDER CHARLES, Defendant-Appellant.	LC No. 01-177229-FH ON RECONSIDERATION

Before: Cooper, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of operating a motor vehicle while under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4), and operating a motor vehicle while license suspended causing death, MCL 257.904(4). Defendant was sentenced to 4 to 15 years in prison on each conviction. We affirm.[1]

This case arises out of an accident that occurred on Interstate 75 in April 2000. At the time of the accident, defendant was intoxicated and asleep behind the wheel of his car, which was stopped in the right lane of the interstate. The victim, who was approaching defendant's car

[1] This Court previously affirmed defendant's convictions. *People v Charles*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2004 (Docket No. 246034). Defendant did not raise the issue regarding the scoring of offense variable 3 at that time. However, following the release of our first opinion in this case, which we have now vacated and incorporated, with some modifications, into this opinion, defendant moved for reconsideration, arguing that the trial court improperly scored OV 3. We granted defendant's motion for reconsideration, but held the matter in abeyance pending our Supreme Court's decision in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005). Judge Griffin was on the panel that rendered the May 18, 2004, decision in this case. Judge White was substituted after Judge Griffin was appointed to the Sixth Circuit Court of Appeals.

while driving her own vehicle, attempted to go around the stopped car, when a second driver, himself intoxicated, struck the victim's car from behind and killed her.

Defendant first argues that the trial court abused its discretion in denying defendant's motion to quash the charge of operating a motor vehicle while license suspended causing death. We disagree.

A circuit court's decision to deny a motion to quash is reviewed de novo to determine if the district court abused its discretion in binding over the defendant for trial in circuit court. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Nonetheless, "a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *Id.*, citing *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989); see also *People v Hall*, 435 Mich 599, 604; 460 NW2d 520 (1990).

In pertinent part, MCL 257.904 reads as follows:

> (1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.
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> (4) A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. This subsection does not apply to a person whose operator's or chauffeur's license was suspended because that person failed to answer a citation or comply with an order or judgment pursuant to section 321a. [*Id.*]

Defendant argues that the trial court improperly denied his motion to quash where his license was suspended for failure to comply with court judgment (FCJ) and failure to appear in court (FAC), which are exceptions to MCL 257.904(4). However, defendant's certified driving record from the Secretary of State indicated that defendant's license was suspended on the date of the accident, April 26, 2000, as a result of a conviction for operating a motor vehicle while impaired by liquor. The suspension was originally imposed from March 24, 1998, through June 21, 1998, and carried the notation that the suspension would continue until payment of a reinstatement fee. Defendant accumulated additional suspensions for: 1) FCJ on a city of Detroit ticket for prohibited turn; 2) FAC on a city of Detroit ticket for failure to display a valid license; and 3) FCJ on a ticket for registration and/or plate violation. The driving record noted an additional suspension from a February 26, 2000, failure to display a valid driver's license. That additional suspension was from April 13, 2000, to May 13, 2000. While defendant's license was also suspended for defendant's failure to pay the reinstatement fee from his February

16, 1998, conviction of operating a motor vehicle while impaired by liquor, we need not consider that issue to decide this case.[2] Because the February 26, 2000, suspension was still in effect on the date of the accident, the trial court did not abuse its discretion in denying defendant's motion to quash.

Thus, we find that the certified copy of defendant's driving record admitted at trial was sufficient to support defendant's conviction for operating a motor vehicle while license suspended causing death. See generally *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Next, we find that there was sufficient evidence that defendant was operating a motor vehicle at the time of the accident to support his conviction of OUIL causing death and driving while license suspended causing death.

MCL 257.625 reads, in pertinent part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:
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> (a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.
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> (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
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> * * *
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> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) or (3) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:
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> (a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. . . . [*Id.*].

MCL 257.904 reads, in pertinent part:

> (1) A person whose operator's . . . license . . . has been suspended . . . and who has been notified as provided in section 212 of that suspension . . . shall not

[2] Defendant argues that failure to pay a reinstatement fee is the equivalent of FAC/FCJ for purposes of the exclusions set forth in MCL 257.904(4). Because we find that defendant was also suspended by his failure to display a valid driver's license on February 26, 2000, we need not address this issue.

> operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles . . . .
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> * * *
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> (4) A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. . . . [*Id*.]

Defendant asserts that because he was not driving at the time of the accident and because there was no evidence that the vehicle was operable, he was not operating a motor vehicle within the meaning of the statute. The test for what constitutes operating a motor vehicle is set forth in *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995), which states that the definition of "operating" should take into account the danger the OUIL statute seeks to prevent: the collision of a car being operated by a person under the influence of liquor with persons or property. In *Wood*, the Supreme Court stated:

> Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk. [*Id*. at 405]

Furthermore, the Supreme Court in *Wood* specifically overruled *People v Pomeroy (On Rehearing)*, 419 Mich 441; 355 NW2d 98 (1984), to the extent that *Pomeroy* held that a person asleep in a motionless car cannot be held to be operating a vehicle. *Wood* concerned a man found unconscious in his van at a McDonald's drive-through window with the engine running, the transmission in drive, and the defendant's foot on the brake. The Supreme Court found that because the defendant had put the vehicle in motion and in a position posing a significant risk of collision and had not returned the vehicle to a position of safety, he was operating the vehicle for the purposes of the OUIL statute even though he was asleep. *Id.* In this case, by parking his car in the right lane of I-75 and passing out in it, defendant put his car in a position posing significant risk of collision. Moreover, defendant had not removed his car from this position of danger at the time of the accident. Therefore, there was sufficient evidence that defendant was operating the vehicle within the meaning of MCL 257.625(4) and MCL 257.904(4).

Defendant further argues that his car stalled on the freeway and that there was no proof that his car was operable. We note that there was testimony that the engine of defendant's car stopped working when defendant's wife drove the vehicle before the accident. We further note that defendant worked on the car after the accident to replace the alternator. However, at trial, defendant himself denied that his vehicle was stopped for mechanical reasons. He insisted that he stopped his car to help with the accident. Further, a witness to the accident testified that defendant's car was running and that the dash and headlights were on when the witness looked in the car immediately after the accident. Neither the evidence nor defendant's testimony support defendant's argument that his car was inoperable.

Defendant also asserts that there was insufficient evidence of causation to support his conviction for OUIL causing death. Specifically, defendant asserts that his conduct was not a

proximate cause of the victim's death because a second driver's decision to drive drunk was an intervening and superseding cause of the victim's death. Our Supreme Court recently issued an opinion addressing the effect of an intervening cause on proximate causation in the context of the offense of OUIL causing death. In *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005), our Supreme Court stated:

> For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a 'direct and natural result' of the defendant's actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.
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> The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. . . .
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> The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death. [*Schaefer*, *supra* at 436-438 (footnotes omitted; emphasis in original).]

In this case, the prosecutor presented sufficient evidence at trial to support a finding by the jury that defendant's conduct was a proximate cause of the victim's death. Defendant's actions of parking his car in a lane of moving traffic on I-75 and then falling asleep in the car due to intoxication set up the series of foreseeable events which followed and resulted in the victim's death. It is reasonably foreseeable that another vehicle will collide with a car that is parked in a moving traffic lane of a major freeway. The fact that the other driver was also intoxicated does not alter the foreseeability of a collision with defendant's parked vehicle because defendant's conduct of parking his car in a moving lane of traffic on a busy highway was so dangerous as to render a collision reasonably foreseeable irrespective of the other driver's sobriety or lack thereof. Proximate cause "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Id.* at 436. Proximate cause does not prevent criminal liability from attaching to defendant's conduct in this case because the victim's death was a direct and natural result of defendant's conduct of operating his vehicle and parking his vehicle in a moving lane of traffic I-75 and then going to sleep. The second driver's behavior did not supersede defendant's act as a legally significant causal factor. Thus, defendant's conduct was a proximate cause of the victim's death.

Moreover, we find that the trial court did not err in failing to instruct the jury with CJI2d 16.15 regarding causation. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124;

631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id*. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The trial court's instruction on causation, that the jury must find that defendant's intoxicated driving was a substantial cause of the victim's death, was legally accurate according to the legal standard that existed at the time of trial. See *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996), rev'd in part *People v Schaefer*, 473 Mich 418 (2005). Defendant argues that the trial court's instruction did not fully present the defense that the second driver's intoxicated driving was an intervening cause that absolved defendant of responsibility. In *People v Bailey*, 451 Mich 657, 677; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), our Supreme Court stated that "[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." The evidence adduced at trial showed that there were two causes of harm to the victim: defendant's motionless car in the right lane of traffic and the second driver's inability to stop in time to avoid hitting the victim. While defendant was free to argue that the second driver's drunk driving was the primary cause of the victim's death and that defendant's drunk driving was not a substantial cause, the evidence did not reveal that the second driver was the sole cause and therefore did not support an instruction that the second driver was an intervening and superseding cause. We therefore conclude that the jury instructions fully and fairly presented the issues to be tried.

Defendant next claims that the trial court erred in failing to instruct the jury that defendant's failure to submit to a breath test may be considered only to show that a test was offered and not as evidence of defendant's guilt. While we find that the failure to give this instruction constituted error, *People v McDonald*, 201 Mich App 270; 505 NW2d 903 (1993), this error did not result in a miscarriage of justice where defendant did not contest the fact that he was intoxicated on the night of the accident but only disputed the element of causation. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000); *People v McDaniel*, 256 Mich App 165, 170; 662 NW2d 101 (2003).

Next, we find no reversible error in the trial court's admission of evidence of defendant's prior conviction of operating a motor vehicle while impaired by liquor. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The admission of the prior conviction did not result in unfair prejudice to defendant where defendant did not dispute that he had been drinking on the night of the accident or that he might have been drunk, but contested only the causation element of the offense.

Finally, we reject defendant's contention that the trial court erred in scoring twenty-five points for offense variable 3.[3] MCL 777.33. "A sentencing court has discretion in determining

[3] Defendant's offense occurred on April 26, 2000, which was before MCL 777.33 was amended to provide for a score of thirty-five points for OV 3 "if death results from the commission of a crime and the elements of the offense . . . involve the operation of a vehicle . . . under the

(continued…)

the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

According to defendant, he should not have been assessed any points for OV 3 because the victim died and the sentencing offense was a homicide. OV 3 concerns "[p]hysical injury to a victim." MCL 777.33. OV 3 provides that one hundred points are to be assessed if a victim was killed "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). It also provides for a score of twenty-five points for OV 3 if a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). In *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005), our Supreme Court recently considered the appropriate score for OV 3 when the victim was shot and killed and held that a score of twenty-five points for OV 3 is proper. According to the Supreme Court:

> The defendant not only killed the victim, but in the process also caused a physical injury . . . . Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: "Life threatening or permanent incapacitating injury." This conclusion is mandated by the fact that the statute governing OV 3 requires that trial courts assess the highest number of points possible. [*Houston*, *supra* at 402.]

In light of our Supreme Court's holding in *Houston*, we conclude that the trial court did not err in assessing defendant twenty-five points for OV 3. Like in *Houston*, the trial court could not have assessed defendant one hundred points for OV 3 because homicide was the sentencing offense. *Id.* at 405; MCL 777.33(2)(b). Furthermore, a score of zero points under OV 3 also would have been inappropriate because a score of zero is appropriate "only when 'no physical injury occurred to the victim.'" *Id.* at 406; MCL 777.33(1)(f). In the course of killing the victim, defendant also caused the victim physical injury, including multiple head injuries. The trial court therefore had the option to assess either twenty-five points for "[l]ife threatening or permanent incapacitating injury" or ten points for "[b]odily injury requiring medical treatment." MCL 777.33(1)(c) and (d); *Houston*, *supra* at 407. Because the statute governing OV 3 requires the trial court to assess the highest number of points possible, the trial court was required to assess twenty-five points under MCL 777.33(1)(c). *Houston*, *supra* at 407.

Affirmed.

/s/ Jessica R. Cooper
/s/ Helene N. White
/s/ Stephen L. Borrello

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influence or while impaired causing death."